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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. **1063**

OHIO VALLEY GAS CORPORATION,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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No. .

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Petitioner Ohio Valley Gas Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on October 31, 1967.

OPINIONS BELOW

The order of the Federal Power Commission of January 11, 1967, upheld by the court below, is reported at 37 F.P.C. 88, and is printed in Appendix A, *infra.* The order of the Federal Power Commission of March 3, 1967, denying petitioner's Petition for Rehearing, is reported at 37 F.P.C. 494 and is printed in Appendix B, *infra.* The Court of Appeals for the District of Columbia Circuit issued no opinion; its judgment is printed in Appendix C, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1967. (Appendix C.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the decision of the Court of Appeals, upholding a Federal Power Commission order approving a pipeline's unilateral request for a retroactive change in rates charged a particular customer, is in conflict with this Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, and *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103.

STATUTE INVOLVED

Sec. 16, Natural Gas Act, Act of June 21, 1938, 52 Stat. 830, 15 U.S.C. § 717o:

> "*Administrative powers of Commission; rules, regulations, and orders.*
>
> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. * * *"

STATEMENT

Petitioner Ohio Valley Gas Corporation, a distributor of natural gas, was a customer of Michigan Wisconsin Pipe Line Company under a contract providing that petitioner would purchase its requirements for gas up to a maximum contract demand of 6,000 Mcf. per day under Michigan Wisconsin's Small General Service Rate Schedule (SGS-1), at a rate of 44.6¢ per Mcf.

On January 1, 1966, petitioner and Michigan Wisconsin executed a new, superseding contract which provided for the purchase of a maximum daily quantity of 6,750 Mcf. according to the following terms:

> "*Applicable Rate Schedule.* The natural gas delivered hereunder shall be paid for under [Michigan Wisconsin's] effective Rate Schedule ACQ-1 on file with the Federal Power Commission or under any other applicable rate schedule or rate schedules of the Seller as from time to time shall be in effect in accordance with the provisions of the Natural Gas Act." (R. 62; JA 19.)

The rate to be charged for gas under Rate Schedule ACQ-1 was 27.65¢ per Mcf., plus a monthly demand charge regardless of the amount of gas purchased. Rate Schedule ACQ-1 also required a reduction in the maximum daily quantity of gas that could be purchased by petitioner during the warmer months of the year.

On January 12, 1966, Michigan Wisconsin made application to the Federal Power Commission for an amendment to its certificate of public convenience and necessity to authorize delivery of the maximum daily quantities of gas called for by the new contract executed with petitioner. At the same time, Michigan Wisconsin tendered the new contract for filing, and requested a waiver of the Commission's rules regarding notice so as to permit the new agreement to take effect as of January 1, 1966. Petitioner did not formally intervene in the proceedings.[1]

On March 14, 1966, the Commission issued an order granting the requested amendment to Michigan Wisconsin's certificate and ordering the new contract into effect as of that date. (R. 67; JA 23.) Michigan Wisconsin failed through inadvertence to give notice to petitioner at this time that the new contract had been ordered into effect. Since petitioner had not formally intervened in these proceedings, it received no notice from the Commission.

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[1] Rule Sec. 1.8(b) (2), Federal Power Commission Rules of Practice and Procedure, authorizes intervention in Commission proceedings by any person having an interest which may be directly affected "and which is not adequately represented by existing parties. . . ." 18 C.F.R. 1.8(b) (2).

On March 16, 1966, the maximum daily quantity under the terms of Rate Schedule ACQ-1 and the new contract dropped to 5,062.5 Mcf., a lesser amount than the 6,000 Mcf. maximum daily quantity provided for by the old, superceded contract. However, since petitioner had not received notice that the new contract had become effective, it contined to purchase gas under the old contract limitations. As a result, its purchases of gas on 11 of the next 30 days exceeded by small amounts the 5,062.5 Mcf. per day which it was in fact authorized to purchase under the new agreement.

On April 14, 1966, petitioner received its March billing from Michigan Wisconsin and was confronted with an assessment of $12,340 of penalties for 1,234 Mcf. of unauthorized overrun gas purchased during the last half of March. This billing constituted petitioner's first notice that the new service agreement had become effective. Petitioner immediately adjusted its purchase requirements to comply with the provisions of the new agreement for the future. Subsequently, petitioner received its April billing from Michigan Wisconsin, which included $21,000 of penalties assessed for an additional 2,100 Mcf. of unauthorized overrun gas purchased between April 1 and April 13. Altogether, during the one-month period from March 14 to April 13, petitioner had unknowingly and unintentionally purchased a total of 3,334 Mcf. of excess gas (representing in the aggregate slightly over one-half of one day's normal allowance), and Michigan Wisconsin had assessed penalty charges amounting to $33,340 in addition to the normal charges for the gas it purchased under the new contract. (R. 72; JA 25.)

Petitioner paid the normal charges for all gas it had received, but declined to pay the penalties because of Michigan Wisconsin's failure to give it timely notice that the new contract had become effective. Upon Michigan Wisconsin's refusal to waive the penalties, petitioner on September 1, 1966 applied to the Federal Power Commission for relief, pointing out that if Michigan Wisconsin had given timely

notice that the new contract had gone into effect, petitioner could easily have avoided purchasing the small amounts of unauthorized overrun gas involved. (R. 69; JA 25.)

Before the Commission, Michigan Wisconsin stated that it would not oppose appropriate Commission action relieving petitioner of penalties, in view of its own failure to give petitioner timely notice. However, it did oppose a "mere waiver" of the penalties, and instead requested that the Commission order the old, superseded rate schedule into effect retroactively for the period from March 14 to April 13 so that petitioner would be required to pay for all gas delivered during that period at the old, higher rate of 44.6¢ per Mcf. It suggested that this be done by "amending" the Commission's order of March 14 to change the effective date of the new contract from March 14 to April 14. (R. 80; JA 30)

Over petitioner's objection, the Commission on January 11, 1967 approved Michigan Wisconsin's request on the ground that it constituted an "equitable solution" to the problem (R. 92; JA 38.) It acted by "amending" its March 14 order so as to place the superseded rate schedule back into effect until April 14. (See Appendix A.) While one effect of the Commission's new order was to relieve petitioner of the penalties that had been imposed (see R. 100; JA 44), its further effect, of course, was to charge petitioner at the old, higher rate for all the gas it had bought between March 14 and April 13.

In its petition for rehearing before the Commission, petitioner asserted that the change in applicable rate schedules violated its contract rights and was therefore unlawful, thus preserving the question for judicial review as required by Sec. 19(b) of the Natural Gas Act. The petition for rehearing stated, in pertinent part:

> "2. *The order of the Commission is contrary to law.*
>
> "Ohio Valley at the instance and request of Michigan Wisconsin entered into a service agreement

and contract whereby Ohio Valley bound itself to pay the rates and take the gas provided for under Michigan Wisconsin Rate Schedule ACQ-1. To change the date of the order has the effect of violating the terms of this agreement." (R. 94; JA 40).

The Commission denied petitioner's petition for rehearing (Appendix B), and the Court of Appeals for the District of Columbia Circuit (Senior Judge Miller and Judges Burger and Tamm) denied petitioner's petition for review without opinion. (Appendix C.)

REASONS FOR GRANTING THE WRIT

The Commission's action, upheld by the court below, is in conflict with two decisions of this Court.

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, this Court held that the Federal Power Commission has no authority to order into effect at the unilateral request of a pipeline a change in the rates charged to a particular customer if such a change violates the contract between the pipeline and its customer. In *Mobile*, the contract between the pipeline and the distributor provided for the sale of gas at a fixed price of 10.7¢ per Mcf. Without the consent of the distributor, the pipeline filed with the Commission a new rate schedule which purported to increase the rate for gas sold under the contract. This Court held that the Commission should have rejected the new rate schedule, since the contract between the parties contained no provision authorizing a change in rates to be made unilaterally by the pipeline. The rate-making powers of natural gas companies were described as follows:

> ". . . [T]o establish *ex parte*, and change at will, the rates offered to prospective customers; *or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer.*" (350 U.S. 332, 343.) (Emphasis supplied.)

Subsequently, in *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, this Court had

before it a contract between pipeline and distributor which provided for the sale of gas on the following terms:

> " 'All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [the appropriate rate schedule designation is inserted here], *or any effective superseding rate schedules,* on file with the Federal Power Commission'." (358 U.S. 103, 105.) (Emphasis in original.)

As in *Mobile,* the pipeline subsequently filed a new rate schedule which purported to increase the rate for gas sold under the contract. Over the objection of three dissenters (Justice Douglas, joined by Chief Justice Warren and Justice Black), the foregoing provisions of the *Memphis* contract was distinguished from the fixed-price provision in *Mobile,* and was deemed to include an agreement by the distributor to pay the pipeline's current "going" rates for gas, as such rates were established from time to time in accordance with the procedures prescribed by the Natural Gas Act. Accordingly, this Court held that the pipeline in *Memphis* was entitled to the requested rate increase. As stated:

> "The important and indeed decisive difference between this case and *Mobile* is that in *Mobile* one party to a contract was asserting that the Natural Gas Act somehow gave it the right unilaterally to abrogate its contractual undertaking, whereas here petitioner seeks simply to assert, in accordance with the procedures specified by the Act, rights expressly reserved to it by contract." (358 U.S. 103, 112.)

Mobile and *Memphis* thus make it clear that where a contract governing rates is in effect, the contract itself is the proper starting point for determining the validity of a unilaterally requested change in rates. Only if the contract authorizes the making of such a change does the Commission have the power to approve it. If the change in question would violate the contract, the request must be rejected.

Here, the contract between petitioner and Michigan Wisconsin that became effective on March 14, 1966, and was

thus in effect when the excess gas was delivered, as well as when Michigan Wisconsin made its request to the Commission, contained the following provision relating to rates:

> "*Applicable Rate Schedule.* The natural gas delivered hereunder shall be paid for under [Michigan Wisconsin's] effective Rate Schedule ACQ-1 on file with the Federal Power Commission, or under any other applicable rate schedule or rate schedules of the Seller as from time to time shall be in effect in accordance with the provisions of the Natural Gas Act." (R. 62; JA 19.)

The foregoing language is quite similar to the language contained in the *Memphis* contract, and presumably constitutes an agreement by petitioner to pay for its gas at the pipeline's current rates, i.e., the rates provided in Rate Schedule ACQ-1 or any other applicable rate schedule that is *in effect when the gas is delivered.* Moreover, the contract expressly provides that such other applicable rate schedule shall be one that has become effective "in accordance with the provisions of the Natural Gas Act." The provisions of the Act authorize prospective rate changes only. They do not contain any procedures under which a pipeline may request approval for a change in the rate to be charged *for gas sold in the past.* Indeed, as stated by the Third Circuit in *Shell Oil Co. v. Federal Power Commission,* 334 F.2d 1002, 1009 (1964):

> "We find nothing in the Act which authorizes a natural gas company to *retroactively* amend existing rates either by contract or otherwise." (Emphasis supplied.)

It is undeniably clear, therefore, that the contract here in question authorized prospective rate changes only, and did not reserve to the pipeline, or even remotely contemplate the exercise of, a right to change rates retroactively. It follows, then, that the contract *required* Michigan Wisconsin to charge the rates provided in its Schedule ACQ-1 for the gas it sold to petitioner between March 14 and April 13.

Michigan Wisconsin's request that a different, higher rate be approved was thus merely a bald-faced effort to abrogate its contractual undertaking.

Notwithstanding the terms of the contract, however, and as part of its action in relieving petitioner of penalties, the Commission blithely approved Michigan Wisconsin's request for a retroactive change in rates. It did so, according to its order, in the belief that the requested rate change provided an "equitable solution" to the dispute. (R. 92; JA 38.) While relief from penalties unfairly imposed is certainly required as a matter of *equity*, *Mobile* and *Memphis* make it clear that the validity of a unilateral rate change cannot be upheld on any such ground. Rather, the propriety of such a change is solely and exclusively a matter of *contract.*[2]

What the Commission should have done with Michigan Wisconsin's request was to hold that since the contract between the parties would be violated by the proposed change in rates, the Commission was powerless to approve it. At the very least, the Commission should have undertaken to interpret the contract and make findings on the question

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[2]The Commission's concept of "equity" is indeed a dubious one. While its order reinstating the superseded rate schedule had the effect of waiving the penalties, it also subjected petitioner to the old, higher rate for all the gas it purchased during the one-month period from March 14 to April 14 (well over 100,000 Mcf.), even though such purchases included only 3,334 Mcf. of excess gas under the new contract limitations, and even though no excess purchases were made until March 23. (R. 72; JA 38.) Since petitioner willingly paid the normal charges for all the gas it bought under the new contract, thereby assuring Michigan Wisconsin that it would suffer no loss, and since Michigan Wisconsin had effectively conceded before the Commission that penalties were inappropriate, the Commission's action in going beyond a mere waiver of the penalties and reinstating the old rate for the entire one-month period can only be characterized as an arbitrary decision to grant the pipeline a "windfall."

of contract authorization for the change. Instead, however, its January 11 order was utterly silent on this question. (Appendix A.) So also was its subsequent order denying petitioner's timely petition for rehearing, which had squarely and expressly challenged the Commission's action on contract grounds. (Appendix B.) (See p. 6, *supra*.)

The Commission's January 11 order, which approved the requested rate change, obviously rested on the Commission's assumption that it has broad power under Sec. 16 of the Natural Gas Act, 15 U.S.C. Sec. 717o, to amend a prior order in any way it chooses merely by asserting that such amendment is "necessary or appropriate to carry out the provisions of this [Act]." (See Brief for Commission in court below, p. 10.) But the Commission's power under Sec. 16, while broad in scope, clearly must be applied so as to "conform with the terms, policies and purposes of the Act." *Public Service Commission of State of New York v. Federal Power Commission,* 327 F.2d 893, 897 (D.C. Cir. 1964). Sec. 16 does not authorize the Commission to do by way of "amendment" what it lacks authority to do under other provisions of the Act, or under the Act as a whole as interpreted by this Court.

Thus, in *Willmut Gas & Oil Company v. Federal Power Commission,* 294 F.2d 245 (D.C. Cir. 1961), cert. den. 368 U.S. 975, reh. den. 369 U.S. 813, the Court of Appeals for the District of Columbia Circuit held that while the Commission was investigating the reasonableness of a new rate scheduled filed *ex parte* by a pipeline, it had no authority under Sec. 16 to enter an order or adopt a rule that would permit it to refuse the filing of yet another rate schedule by the pipeline. The Court reasoned that since *Mobile* gave the pipeline the *unqualified right* at any time to change the rates at which it offers service to customers with whom it had no contract, the Commission's broad general powers under Sec. 16 could not under any circumstances be used to "nullify or restrict" such right.

As has been indicated, *Mobile* and *Memphis* also make it clear that the Commission has no power to approve a pipeline's unilateral request for a change in the rates it charges a particular customer, where its contract with that customer would be violated by the making of such a change. The concomitant of this, of course, is that the customer has an unqualified right, based on its contract, to have any such request rejected by the Commission. In fact, *Mobile* squarely holds that rejection is what the Act requires.[3] Accordingly, it is clear that the Commission had no authority under Sec. 16 to promulgate the suggested amendment to its March 14 order, since the effect of its action was completely and utterly to nullify petitioner's unqualified right to have the pipeline's request rejected. Sec. 16 cannot in any way support the Commission's action in the instant case.

On the basis of the foregoing, therefore, it is plain that the Commission's action in approving the requested change in rates clearly exceeded its authority under the Act, and is in direct conflict with this Court's decisions in *Mobile* and *Memphis*. As such, it cannot be permitted to stand.

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[3]It is true that in both *Mobile* and *Memphis* the pipeline sought to accomplish the desired rate change by filing a new rate schedule with the Commission, while here the pipeline merely requested the Commission to amend a prior order to change the effective date of a new rate schedule, and thereby reinstate an old, superseded schedule. But this is a distinction without a difference. In all three cases, the pipeline initiated action designed to change the rate it would otherwise charge for gas sold to a particular customer pursuant to contract. The rule is clear that such a change cannot be approved *if it would violate the terms of the contract.*

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded to the Federal Power Commission for reconsideration in light of this Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, and *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103. In the alternative, the petition should be granted and the case set down for oral argument.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles B. Ross, Carl E. Bagge, and John A. Carver, Jr.

Michigan Wisconsin Pipe Line Company) Docket No.
) CP65-190

ORDER AMENDING ORDER GRANTING CERTIFICATE

(Issued January 11, 1967)

Ohio Valley Gas Corporation (Ohio Valley) on September 1, 1966, requested that the Commission direct Michigan Wisconsin Pipe Line Company (Michigan Wisconsin) to waive certain overrun penalties in the amount of $33,340 assessed against Ohio Valley during the months of March and April, 1966. In support thereof, Ohio Valley states that it was not served with the Commission's order of March 14, 1966,[1] and consequently had no knowledge that as of March 14, 1966, it was purchasing gas under a service agreement dated January 1, 1966, and Michigan Wisconsin's Rate Schedule ACQ-1, rather than a superseded service agreement which provided for purchases under Rate Schedule SGS-1. Accordingly, Ohio Valley continued to purchase gas during the months of March and April at approximately its entitlement of 6,000 Mcf per day under Rate Schedule SGS-1. Because

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[1] That order granted Michigan Wisconsin's request for an amendment to the Certificate of Public Convenience granted on March 30, 1965, in this proceeding and authorized an increase in the MDQ delivered to Ohio Valley from 6,000 Mcf per day under Rate Schedule SGS-1, to 6,750 Mcf per day under Rate Schedule ACQ-1.

its contract entitlement under the service agreement dated January 1, 1966 was 75 percent of 6,750 Mcf or 5,062, Ohio Valley between March 23rd and April 13th unknowingly took 3,334 Mcf of overrun gas. The overrun charges of $33,340 resulted.

In its answer filed on October 31, 1966 Michigan Wisconsin states that since there is no provision in its tariff which permits the waiving of overrun penalties, it would oppose Ohio Valley's request. It stated, however, that it would have no opposition to appropriate Commission action which may relieve Ohio Valley of the overrun charges. Michigan Wisconsin suggested that this may be accomplished by making the new service agreement effective as of April 14, 1966, rather than March 14, 1966, as provided in the Commission order of March 14, 1966.

Ohio Valley, by tender of November 25, 1966, objects to the proposal offered by Michigan Wisconsin alleging that this "would merely reduce the amount of the penalty from $33,340 to $8,545." A review of the facts indicates that the $8,545 to which Ohio Valley refers is not an overrun penalty charge. It is in fact, a charge for the gas actually received including the aforementioned 3,334 Mcf under Rate Schedule SGS-1 over that which it would have paid under Rate Schedule ACQ-1, for the same volumes. The Commission concludes therefore, that an equitable solution results from billing Ohio Valley under the service agreement and rate schedule which it believed to be effective at the time that the 3,334 Mcf was delivered. Michigan Wisconsin's answer therefore is considered as a motion to amend the aforementioned order issued March 14, 1966, in this proceeding. Based on the circumstances herein, we believe it is in the public interest in carrying out the provisions of the Natural Gas Act to grant the motion.

The Commission orders:

(A) Paragraph (B) of the Commission's order issued March 14, 1966, in this proceeding, is hereby amended to provide that the service agreement between Michigan Wisconsin and

Ohio Valley dated January 1, 1966, be effective as of April 14, 1966.

(B) The request of Ohio Valley as filed on September 1, 1966, is hereby denied.

(C) In all other respects, the aforementioned order issued March 14, 1966, shall remain in full force and effect.

By the Commission

(S E A L)

Joseph E. Gutride,
Secretary.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles B. Ross, Carl E. Baggee, and John A. Carver, Jr.

Michigan Wisconsin Pipe Line Company) Docket No.
) CP65-190

ORDER DENYING PETITION FOR REHEARING AND REQUEST FOR ORAL ARGUMENT

(Issued March 3, 1967)

Ohio Valley Gas Company (Ohio Valley), on February 2, 1967, filed a petition for rehearing of the order issued January 11, 1967, in this docket together with a request for opportunity to present oral argument of its petition. The background of this controversy is fully described in our orders issued March 14, 1966, and January 11, 1967. The following brief summary, however, will serve to put the matter in focus.

In the January 11 order we provided that a superseding service agreement dated January 1, 1966, between Ohio Valley and its supplier, Michigan Wisconsin Pipe Line Company (Mich-Wisc.) become effective as of April 14, 1966, instead of March 14, 1966, as prescribed in the order issued on the latter date. That superseding service agreement provided for deliveries of gas to Ohio Valley under Mich-Wisc's Rate Schedule ACQ-1.

Based on presentations made by Ohio Valley in its application filed September 1, 1966, for waiver of penalties, our order issued January 11, 1967, relieved Ohio Valley of $24,795 of penalties (out of a total of $33,340 assessed).

That order also determined that the remaining amount was not a penalty but a proper charge under Mich-Wisc's Rate Schedule SGS-1 for gas actually taken.

We have carefully analyzed Ohio Valley's petition for rehearing and find it to be without merit. Ohio Valley's contentions are summed up in its statement that "Having assumed the liability for the rate ACQ-1 during the period from March 14 to April 14, Ohio Valley is entitled to any benefits which accrue to it from ACQ-1 rate during that period ... .". On its face that claim appears fair. However, it fails to note that in the "liability" assumed was the obligation to pay, at penalty prices, for all unauthorized takes of gas above a fixed percentage of the contract demand. That obligation Ohio Valley requested be waived because it was not given notice that the ACQ-1 Rate Schedule was made effective as to its gas during the period March 14 to April 14, 1966, at approximately its entitlement under Rate Schedule SGS-1 and its superseded service agreement. The January 11 order in effect waives that obligation and provides for payment for gas in accordance with the rate schedule Ohio Valley assumed to be effective during the period involved. The contentions reiterated in the petition for rehearing are fully discussed and dealt with in the order issued January 11, 1967.

Ohio Valley's claim that we erred in failing to hold that the penalties assessed were illegal and void, is similarly without basis. Our order issued January 11 clearly sets out that under the relief there granted Ohio Valley is not being assessed any penalties. It is only being required to pay for gas actually taken pursuant to the appropriate rate schedule.

The Commission finds:

The assignments of error and grounds for rehearing set forth in Ohio Valley's petition filed February 2, 1967, present no new facts or principles of law which were not considered by the Commission when it issued its order on January 11, 1967, or which having now been considered warrant any change or modification of that order.

The Commission orders:

Ohio Valley's petition for rehearing and request for oral argument thereon filed February 2, 1967, hereby are denied.

By the Commission.

(S E A L)

Joseph H. Gutride,
Secretary.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,957 **September Term, 1967.**

Ohio Valley Gas Corporation,
Petitioner

v.

Federal Power Commission,
Respondent

Michigan Wisconsin Pipe Line Company,
Intervenor

On Petition for Review of Order of the Federal Power Commission.

Before: Wilbur K. Miller, Senior Circuit Judge, and Burger and Tamm, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the petition to set aside the order of the Federal Power Commission on review in this case is hereby denied.

Per Curiam

Dated: OCT 31 1967

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No. 1063

In the Supreme Court of the United States

OCTOBER TERM, 1967

OHIO VALLEY GAS CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1063

OHIO VALLEY GAS CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

Prior to January 1, 1966, petitioner purchased natural gas from American Louisiana Pipe Line Company under that pipeline's Small General Service ("SGS") Rate Schedule (J.A. 26). According to the terms of this schedule, petitioner could purchase up to 6,000 Mcf per day (J.A. 25–26). On January 1, 1966, American Louisiana merged into Michigan-Wisconsin Pipe Line Company.[1] In addition to its own SGS schedule, Michigan-Wisconsin offered an Annual Contract Quantity ("ACQ–1") schedule which allows the customer each year 190 times his Maximum Daily Quantity

[1] Both pipeline companies were wholly owned subsidiaries of American Natural Gas Company.

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(MDQ). The customer is entitled to purchase his full MDQ on any day during the winter months of November through February, 85% of his MDQ from March 1 through March 15, and 75% of his MDQ from March 16 through October 31 (J.A. 1–2, 8). The rate under this schedule was 27.65¢ per Mcf, plus a fixed monthly charge (J.A. 2). For the period involved here, this price was lower than the 44.6¢ per Mcf price under the SGS schedule (J.A. 9). In addition, penalties were provided for unauthorized overruns.[2]

Petitioner concluded that during the winter months it required 750 Mcf per day over the 6,000 Mcf allowed under the SGS schedule. It therefore entered into an agreement to purchase its gas under Michigan-Wisconsin's ACQ-1 Schedule, effective as of January 1, 1966 (J.A. 18–21).

On January 12, 1966, Michigan-Wisconsin filed a motion with the Federal Power Commission to amend its certificate to approve the new service agreement effective as of January 1, 1966 (J.A. 12–13). The motion was served on all Michigan-Wisconsin customers including petitioner, and on the various interested State commissions (J.A. 13–18). No one protested or sought intervention. On March 14, 1966, the Commission granted the motion, except that it made the agreement effective as of the day its order was issued, March 14, 1966 (J.A. 23–25).

Since petitioner had not intervened and, therefore, was not a party, no notice of this action was given it

[2] Penalties are imposed because if one purchaser takes extra volumes, another purchaser down the line may not receive its full entitlement.

by the Commission. See Section 1.30(i) of the Commission's Rules of Practice, 18 CFR 1.30(i). Michigan-Wisconsin also gave no notice to petitioner. During various days in March and April 1966, petitioner took a total of 3,334 Mcf over the 5,062.5 Mcf its ACQ Schedule allowed between March 16 and October 31 (J.A. 28). These excess volumes were billed at the $10 per Mcf penalty in addition to the regular cost, for a total penalty of $33,340 (J.A. 4, 28). Petitioner became aware of the Commission's March 14 order on April 14, 1966, when it received the billing from Michigan-Wisconsin for its March purchases in the total amount of $137,786.54 (J.A. 36, 44–45). It then modified its operations to comply with the ACQ limits.

On September 1, 1966, petitioner requested the Commission to authorize and direct Michigan-Wisconsin to waive the penalties (J.A. 26). Michigan-Wisconsin did not object to some relief, but asserted that it would be inappropriate both to waive the penalties and, as petitioner desired, still allow the lower basic rate of the ACQ schedule (J.A. 31–32). The Commission agreed and approved as equitable Michigan-Wisconsin's proposal to make the new service agreement effective as of April 14, 1966, treating sales prior to that time as made under the SGS schedule (J.A. 32).

Petitioner filed, and the Commission denied, a timely petition for rehearing (J.A. 39–43). On review, the Court of Appeals for the District of Columbia Circuit affirmed *per curiam*.

The decision below does not conflict with this Court's holdings in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, and *United Gas Pipe Line*

Co. v. *Memphis, Light, Gas and Water Division,* 358 U.S. 103, that a natural gas company may not unilaterally file an increased rate that is contractually unauthorized. Here, as petitioner acknowledges (Pet. 7), the new service agreement, which made the ACQ rate schedule applicable, was contractually authorized when it was filed. The Commission acted lawfully and equitably in relieving petitioner of a contract that caused penalties to accrue where petitioner had failed to take steps to guarantee that it had notice. It would be curious indeed if the Commission, while relieving petitioner of the penalties for which the contract called, was legally bound to grant petitioner the advantages of the lower price of the ACQ schedule. In sum, the decision below is clearly correct and the case is in no event of sufficient general importance to warrant review in this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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